

PACIFIC LEGAL FOUNDATION
10940 NE 33rd Place, Suite 109
Bellevue, WA 98004
(425) 576-0484 FAX (425) 576-9565

RUSSELL C. BROOKS, WSBA No. 29811
Pacific Legal Foundation
10940 NE 33rd Place, Suite 109
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
rb@pacificlegal.org
Attorney for Intervenor-Applicants

Honorable John C. Coughenour

FILED
LOGGED
RECEIVED

MAIL

JAN 13 2005

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON TOXICS COALITION, et
al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
INTERIOR, et al.,

Defendants

and

CROPLIFE AMERICA,

Defendant-Intervenors,

and

WASHINGTON FRIENDS OF FARMS
AND FORESTS, et al.,

Proposed Intervenor-
Applicants.

No. 04-CV-01998

REPLY IN SUPPORT OF MOTION TO
INTERVENE OF WASHINGTON
FRIENDS OF FARMS AND FORESTS;
WASHINGTON STATE POTATO
COMMISSION; NATIONAL POTATO
COUNCIL; WASHINGTON STATE FARM
BUREAU; IDAHO FARM BUREAU
FEDERATION; WASHINGTON
ASSOCIATION OF WHEAT GROWERS;
WASHINGTON STATE DAIRY
FEDERATION; WESTERN
WASHINGTON GOLF COURSE
SUPERINTENDENTS ASSOCIATION;
HOP GROWERS OF WASHINGTON; AND
WASHINGTON STATE
HORTICULTURAL ASSOCIATION

NOTE ON MOTION CALENDAR:

January 14, 2005



04-CV-01998-REPLY

INTRODUCTION

In preparation to intervene in this action, counsel for Intervenor-Applicants Washington Friends of Farm and Forests, et al. (Stewards), spoke via telephone with counsel for Plaintiffs (Ms. Williams-Derry) on two occasions in order to determine Plaintiffs' position on the Stewards' motion to intervene. The Stewards' counsel described for Plaintiffs' counsel the specific parties intending to intervene, discussed in general the fact that the Stewards would seek to have the counterpart regulations upheld, and noted for Plaintiffs that most of the parties had participated as intervenor-defendants in this Court during Plaintiffs' previous pesticide litigation. At no time during either conversation did Plaintiffs' counsel indicate any type of concern regarding any issue surrounding the Stewards moving to intervene and, indeed, indicated Plaintiffs did not oppose the Stewards' motion, consistent with Ninth Circuit precedent. In fact, Plaintiffs' counsel asked only that the Stewards not raise any new issues or claims.

However, now that the Stewards have moved to intervene, Plaintiffs express concern over the possibility of "duplicative and burdensome briefing" from the Stewards and the existing Intervenor (CropLife). As shown herein, Plaintiffs' concerns are not valid and their request to have all Intervenor submit combined briefing or file separate briefs which, when combined, do not exceed the applicable page limits should be denied.

ARGUMENT

THE STEWARDS SATISFY RULE 24 AND SHOULD BE GRANTED INTERVENTION AS A MATTER OF RIGHT UNFETTERED BY THE PLAINTIFFS' ARTIFICIAL CONDITIONS

Plaintiffs' response to the Stewards' motion to intervene seems to question whether CropLife adequately represents the Stewards' interests, sufficient that both the Stewards' and CropLife's briefing of the issues should be limited. The answer to that question is "no," because the Stewards' interests are unique and thus not represented adequately by CropLife or any other party to this litigation.

///

///

1 **A. The Stewards Possess Unique Legally Protectable Interests in This Action**

2 The "subject of this action" is a set of regulations designed to facilitate compliance with the
3 Endangered Species Act (ESA) in registering pest control products under the Federal Insecticide,
4 Fungicide, and Rodenticide Act (FIFRA). The Stewards' effort to intervene in this action to protect
5 their livelihoods is unique because they are the *only actual users* of pest control products present
6 in this litigation. As such, the Stewards possess self-evident interests in securing the efficient and
7 proper approval and registration of pest control products in order to maintain their ways of life.
8 Clearly, the Stewards have unique interests in this action.

9 The Stewards' interests are unique, beyond Defendants' and CropLife's interests, because
10 use of pest control products is an integral part of on-the-ground agricultural and horticultural
11 practices due to the annual, urgent, and immediate need to control pests, fungus, and noxious
12 weeds. *See Declaration of Heather Hansen in Support of Intervention (Hansen Decl.)* ¶ 2. Failure
13 to use necessary pest management products will harbor the pests, fungus, and/or disease and spread
14 it to the rest of the crop, thereby destroying the entire crop and, consequently, the viability of
15 pursuing future crops. *Id.* Accordingly, ensuring the continued availability of FIFRA registered
16 pest control products is essential to the Stewards' continued existence. *Id.*

17 The Stewards' use of pest management products to protect their crops and their livelihoods
18 provides the Stewards with unique interests in this challenge to the counterpart regulations. The
19 counterpart regulations improve a process fraught with inefficient regulatory overkill that harms
20 the Stewards. If Plaintiffs successfully invalidate the counterpart regulations, the Stewards'
21 livelihoods will suffer under generic, ill-designed regulations. Hansen Decl. ¶ 3. Such a scenario
22 harms the Stewards not merely by virtue of regulatory overkill and associated high costs which
23 CropLife would suffer, but by the likelihood that lesser regulations would needlessly restrict use
24 of environmentally safe pest control products, further harming the Stewards by threatening their
25 way of life. *Id.*

26 The Stewards' unique interests indicate they also would suffer unique harm should the
27 Court grant Plaintiffs the relief they seek. Thus, the relief Plaintiffs seek would not impact the

28 ///

1 Stewards and CropLife in necessarily the same manner. Accordingly, this Court should refuse to
2 condition the Stewards' intervention in defense of their unique interests.

3 **B. None of the Parties Adequately Represent the Stewards' Interests**

4 An applicant must show the existing parties *may* not adequately represent its interests. *See*
5 *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983). An applicant satisfies this
6 requirement upon showing representation of its interests "may be" inadequate. *Trbovich v. United*
7 *Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972). "The burden of making this showing
8 should be treated as minimal." *Id.*; *see also Southwest Center for Biological Diversity v. Berg*, 268
9 F.3d 810, 823 (9th Cir. 2001).

10 CropLife and the Stewards share a basic interest of defending the counterpart regulations
11 to ensure they withstand challenge. But this basic interest "does not necessarily ensure agreement
12 in all particular respects about what the law requires." *Natural Resources Defense Council v.*
13 *Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977). Beyond this very basic interest, CropLife's and the
14 Stewards' interests diverge. Thus, CropLife "may not" adequately represent the Stewards' unique
15 interests.

16 The Stewards have a unique interest in this litigation because they consist largely of on-the-
17 ground users of pest control and crop protection products in Washington State who seek to ensure
18 the continued viability of their way of life. Indeed, the Stewards consist of local individuals who
19 are highly sensitive to negative and burdensome impacts to their farms, ranches, land, and small
20 businesses. Hansen Decl. ¶ 4. The dysfunctional regulatory system Plaintiffs seek would directly
21 and immediately impact growers' access to pest control and crop protection products and increase
22 their production costs to devastating levels. *Id.* Moreover, many growers have combined to
23 contribute millions of dollars developing integrated pest management systems which lessen
24 reliance on the most toxics products. *Id.* Even a relatively minor negative change in regulation
25 could wreak havoc on these systems. *Id.* Because of the Stewards' circumstances, the relief
26 Plaintiffs seek would impact the Stewards in a far different and detrimental manner than it would
27 CropLife.

28 ///

1 In contrast, CropLife, headquartered in Washington, D.C., is a *national* organization
2 representing *major* manufacturers, formulators, and distributors of crop protection and pest control
3 products. See Unopposed Motion of CropLife America to Intervene as Party Defendant, and
4 Memorandum in Support (CropLife Motion) at 3:24-26. CropLife represents the crop protection
5 and pest control *industry*, *id.* at 4:6-7, and businesses that market crop protection and pest control
6 products. *Id.* at 6:8-10. Thus, CropLife's interest is national in scope and could conceivably be
7 influenced by actions and circumstances in other parts of the country. Due to its "national
8 industry" focus and interest, CropLife is arguably better able to adapt and respond to localized
9 regional challenges facing the overall industry.

10 Accordingly, CropLife has a national industry, but not an on-the-ground, stake in opposing
11 Plaintiffs' attempt to invalidate the counterpart regulations. This difference between the two
12 parties provides a different perspective concerning the issues in this case in that the Stewards
13 represent the unique, on-the-ground interests of actual users of pest control and crop protection
14 products. Indeed, although CropLife and some organizations consisting of the Stewards
15 participated together as intervenor-defendants in the previous litigation, see *Washington Toxics*
16 *Coalition v. EPA*, No. C01-0132C (W.D. Wash.), the differences noted herein and experienced in
17 the previous litigation led to the Stewards seeking to intervene separately on behalf of their unique
18 interests in the current litigation. Hansen Decl. ¶ 5.

19 Because of their differences and the fact CropLife cannot adequately represent the
20 Stewards' unique interests, Plaintiffs' fear of duplicative briefing is unsubstantiated and
21 unwarranted. Moreover, the Stewards' briefing will be "burdensome" only given the fact it seeks
22 to prevent Plaintiffs' suit from resulting in relief that threatens the Stewards' way of life.
23 Accordingly, no reason exists to limit the Stewards' participation in this matter and the Court
24 should not condition the Stewards' ability to protect their unique interests.

25
26
27
28


PACIFIC LEGAL FOUNDATION
10940 NE 33rd Place, Suite 109
Bellevue, WA 98004
(425) 576-0484 FAX (425) 576-9565

CONCLUSION

Because the Stewards possess unique interests in this case that *no party* other than the Stewards can adequately represent, this Court should grant the Stewards' intervention unfettered by artificial page limits or the requirement that they combine their briefing with CropLife.

DATED: January 12, 2005.

Respectfully submitted,



RUSSELL C. BROOKS, WSBA No. 29811
Pacific Legal Foundation
10940 NE 33rd Place, Suite 109
Bellevue, Washington 98004
Telephone: (425) 576-0484

Attorney for Intervenor-Applicants

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2

3

4
3

6
7
8
9
10
11
12
13
14

15
16
17

J. Michael Klise
Crowell & Moring
1001 Pennsylvania Avenue NW
Washington, DC 20004-2595

18

19

John James Leary, Jr.
Leary Franke Droppert
1500 Fourth Avenue, Suite 600
Seattle, WA 98101

21

22

23
24

25

26